# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Attorney-General (Qld) v Morris & Anor* [2015] QCA 112 |
| PARTIES: | **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**<br>(applicant)<br>**v**<br>**ANTHONY JOHN HUNTER MORRIS**<br>(first respondent)<br>**QUEENSLAND POLICE SERVICE**<br>(second respondent) |
| FILE NO/S: | Appeal No 2632 of 2015<br>DC No 676 of 2015 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Case Stated |
| ORIGINATING COURT: | District Court at Brisbane – Unreported, 30 January 2015 |
| DELIVERED ON: | 23 June 2015 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 3 June 2015 |
| JUDGES: | Holmes and Gotterson and Morrison JJA<br>Judgment of the Court |
| ORDER: | **The question asked by the special case should be answered as follows:**<br><br>**Question: Is s 114 of the *Transport Operations (Road Use Management) Act* 1995 (Qld) invalid on the ground that it infringes the principle identified in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51?**<br><br>**Answer: No.** |
| CATCHWORDS: | APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – OTHER MATTERS – CASES STATED AND REFERENCE OF QUESTION OF LAW – where the Attorney-General for the State of Queensland applied for an order pursuant to s 61(5)(a) of the *Supreme Court of Queensland Act* 1991 removing a proceeding into the Court of Appeal – where the proceeding to be removed is from the District Court of Queensland – where the proceeding is a special case stated for the opinion of the District Court by his Honour the Chief Magistrate – where the order for stating the special case was made in Brisbane in a proceeding between the second respondent and the first respondent – where the first respondent had given |

notice pursuant to s 72B of the *Judiciary Act* 1903 (Cth) that the proceeding involved a matter arising under the Commonwealth Constitution or involving its interpretation – where the Attorney-General for the State of Queensland notified the registrar of the Magistrates Court of an intention to intervene in the proceeding – where the first respondent received an Infringement Notice that indicated that a Volvo Wagon had been detected by a photographic detection device travelling at 57 km/h along Carmody Road, St Lucia, within a speed zone of 50 km/h – where the first respondent was the registered operator of the vehicle at the time of the alleged offence – where the second respondent did not contend that the first respondent is the "actual offender" within the meaning of s 114(1) of the *Transport Operations (Road Use Management) Act* 1995 (Qld) – where it was common ground that, as the registered operator of the Volvo Wagon the subject of the Infringement Notice, the first respondent was, at the date of the detected speeding, the person in charge of the vehicle as that term is defined in s 113 of the *Transport Operations (Road Use Management) Act* 1995 (Qld) – where it was also common ground that, not having given a notice under s 114(3)(b) of the *Transport Operations (Road Use Management) Act* 1995 (Qld), the first respondent has continued to be the person in charge of the vehicle at the date of the detected speeding – whether s 114 of the *Transport Operations (Road Use Management) Act* 1995 (Qld) is invalid on the ground that it infringes the principle identified in *Kable*

*Acts Interpretation Act* 1954 (Qld), s 41
*District Court of Queensland Act* 1967 (Qld), s 122
*Judiciary Act* 1903 (Cth), s 72B
*State Penalties Enforcement Act* 1999 (Qld)
*Supreme Court of Queensland Act* 1991 (Qld), s 61(5)(a), s 61(5)(b)
*Transport Operations (Road Use Management) Act* 1995 (Qld), s 112, s 113, s 113-121, s 114, s 114(1), s 114(2), s114(3), s 114(3)(b), s 114(8), s 115, s 116, s 117, s 118, s 119, s 120, s 121
*Transport Operations (Road Use Management – Road Rules) Regulation* 2009 (Qld), s 20, s 353

*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; [1992] HCA 64, cited
*Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; [2004] HCA 46, considered
*John Holland Pty Ltd v Walz Marine Services Pty Ltd* [2011] QSC 39, cited
*Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; [1996] HCA 24, considered
*Nicholas v The Queen* (1998) 193 CLR 173; [1998] HCA 9, considered
*Owen v Menzies* [2011] QCA 241, cited

*Re Nolan; Ex parte Young* (1991) 172 CLR 406; [1991] HCA 29, considered
*Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; [1989] HCA 12, cited
*Saunders v Bowman* [2008] QCA 112, considered
*Williamson v Ah On* (1926) 39 CLR 95; [1926] HCA 46, considered

COUNSEL: P J Dunning QC SG, with A D Keyes, for the applicant and second respondent
The first respondent appeared on his own behalf

SOLICITORS: Crown Solicitor for the applicant and second respondent
The first respondent appeared on his own behalf

[1] **THE COURT:** The Attorney-General for the State of Queensland has applied for an order pursuant to s 61(5)(a) of the *Supreme Court of Queensland Act* 1991 removing a proceeding into this Court. The proceeding sought to be removed is BD676 of 2015 in the District Court of Queensland. It is a special case stated for the opinion of that Court by his Honour the Chief Magistrate on 30 January 2015. The special case was stated in accordance with s 122 of the *District Court of Queensland Act* 1967, without objection.

[2] The order for stating the special case was made in Brisbane in proceeding MAG00178282/14(0) between the Queensland Police Service and Anthony John Hunter Morris. On 14 January 2015, Mr Morris had given notice pursuant to s 72B of the *Judiciary Act* 1903 (Cth) that this proceeding involved a matter arising under the Commonwealth Constitution or involving its interpretation. The Attorney-General for the State of Queensland notified the registrar of the Magistrates Court at Brisbane of an intention to intervene in the proceeding on 27 January 2015.

[3] Thus, the parties to the application currently before this Court are the Attorney-General as applicant, Mr Morris as first respondent, and Queensland Police Service as second respondent. This application is not opposed by either respondent.

**The special case**

[4] The special case is stated in the following terms:

> "1. On 30 May 2014, an Infringement Notice was issued to the defendant under the *Transport Operations (Road Use Management) Act 1995* and the *State Penalties Enforcement Act 1999* ('the Infringement Notice').
>
> 2. The Infringement Notice indicated that a Volvo Wagon with vehicle registration number Q650827 ('the vehicle') had been detected by a photographic detection device travelling at 57 km/h along Carmody Road, St Lucia, within a speed zone of 50 km/h.
>
> 3. The defendant was the registered operator of the vehicle at the time of the alleged offence. The prosecution does not contend that the defendant is the "actual offender" within the meaning of s 114(1) of the *Transport Operations (Road Use Management) Act 1995*.

4. On 1 July 2014, the defendant wrote to the Department of Transport and Main Roads, attaching the Infringement Notice with "Section B – Election for Court Hearing" completed. A copy of that letter and attachment are Attachment 1 to this special case.

5. On 30 December 2014, Sergeant Longhurst wrote to the defendant. A copy of that letter is Attachment 2 to this special case.

6. On 14 January 2015, the defendant wrote to the Attorney-General, indicating his intention to raise a constitutional question in this matter. A copy of that notice is Attachment 3 to this special case.

*Question*

7. Is s 114 of the *Transport Operations (Road Use Management) Act 1995* (Qld) invalid on the ground that it infringes the principle identified in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51?"[1]

**Order for removal**

[5] The discretion conferred by s 61(5)(a) is conditioned upon this Court first being satisfied that special circumstances exist that make removal desirable. Here, such circumstances do exist. The special case puts in issue the constitutional validity of a significant provision in the Queensland road traffic legislation.[2] The resolution of the issue has potentially wide-ranging implications for the efficacy of photographic speed detection devices in this State.[3] Moreover, the facts of the special case are concise and they are not in dispute.[4]

[6] The same special circumstances justify exercise of the discretion under the section. It is appropriate then that there be an order removing proceeding BD676 of 2015 from the District Court to this Court. Pursuant to s 61(5)(b), the special case must now be continued and disposed of in this Court.

**Legislative provisions**

[7] Chapter 5 Part 7 of the *Transport Operations (Road Use Management) Act* 1995 ("TORUM Act") (ss 112-121) is headed "Detection Devices". Division 2 thereof (ss 113-121) is concerned with photographic detection devices. Section 114 is a principal provision in Division 2. It is enacted in the following terms:

> "(1) If a prescribed offence happens and the offence is detected by a photographic detection device, a person is taken to have committed the offence if the person was the person in charge of the vehicle that was involved in the offence at the time the offence happened even though the actual offender may have been someone else.

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1 Record Book ("RB") 11. The defendant is Mr Morris.
2 Cf *Owen v Menzies* [2011] QCA 241 at [20].
3 Cf *John Holland Pty Ltd v Walz Marine Services Pty Ltd* [2011] QSC 39 at [17].
4 Cf *Owen v Menzies* [2011] QCA 241 at [16], [21].

(2) If the actual offender is someone else, subsection (1) does not affect the liability of the actual offender but the person in charge and the actual offender can not both be punished for the offence.

(3) It is a defence to a camera-detected offence, other than an unregistered or uninsured offence, for a person to prove that—

(a) the person was not the driver of the vehicle at the time the offence happened; and

(b) the person—

(i) has notified the commissioner or chief executive of the name and address of the person in charge of the vehicle at the time the offence happened; or

(ii) has notified the commissioner or chief executive that the person did not know and could not, with reasonable diligence, have ascertained the name and address of the person in charge of the vehicle at the time the offence happened.

(3A) It is a defence to an unregistered or uninsured offence for a person to prove that—

(a) when the offence happened, the vehicle—

(i) was stolen or illegally taken; or

(ii) had been sold or otherwise disposed of; and

(b) if the vehicle was stolen or illegally taken—the person has notified the chief executive of that fact and either—

(i) the name and address of the person who stole or took the vehicle; or

(ii) that the person did not know and could not, with reasonable diligence, have ascertained the name and address of the person who stole or took the vehicle; and

(c) if the vehicle had been sold or otherwise disposed of—the person has notified the chief executive of that fact and of the following information—

(i) the name and address of the person to whom the vehicle was sold or disposed of;

(ii) the date and, if relevant, time of the sale or disposal.

(4) A defence under subsection (3) or (3A) is available only if the person notifies the commissioner or chief executive about the matters in subsections (3) and (6), or subsection (3A), in a statutory declaration given within the required time.

(5) The required time is 28 days after whichever of the following is first given to the person—

(a) a written notice from the commissioner or chief executive alleging a camera-detected offence;

(b) an infringement notice under the *State Penalties Enforcement Act 1999*.

(6) For subsection (3)(b)(ii) a person must prove that—

(a) at the time the offence happened, the person—

(i) exercised reasonable control over the vehicle's use; and

(ii) had in place a reasonable way of finding out the name and address of the person in charge of the vehicle at any given time having regard to—

(A) the number of drivers; and

(B) the amount and frequency of use; and

(C) whether the vehicle was driven for business or private use; and

(b) after the offence happened, the person made proper search and enquiry to ascertain the name and address of the person in charge of the vehicle at the time the offence happened.

(7) Subsection (6) does not apply if the person is able to prove that at the time the offence happened the vehicle—

(a) was stolen or illegally taken; or

(b) had already been sold or otherwise disposed of.

(8) Nothing in this section stops a person notifying the commissioner or chief executive, in a statutory declaration, that the person was the driver of the vehicle involved in a camera-detected offence.

(9) A notification purporting to have been given for a body corporate by a director, manager or secretary of the body corporate is to be taken to have been given by the body corporate."

[8] Section 114(1) is conditioned upon the happening of a prescribed offence, a term defined in s 113 to include an offence prescribed for Part 7 by a regulation. Section 20 of the *Transport Operations (Road Use Management – Road Rules) Regulation* 2009 states:

> "A driver must not drive at a speed over the speed limit applying to the driver for the length of road where the driver is driving.
>
> Maximum penalty—40 penalty units."

A contravention of section 20 is an offence.[5] Section 353 of this Regulation states that an offence against s 20 is a prescribed offence for Chapter 5 Part 7 of the TORUM Act.

[9] It is common ground that, as the registered operator of the Volvo Wagon the subject of the Infringement Notice, Mr Morris was, at the date of the detected speeding, the

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5 *Acts Interpretation Act* 1954 s 41.

person in charge of the vehicle as that term is defined in s 113.[6] It is also common ground that, not having given a notice under s 114(3)(b), he has continued to be the person in charge of the vehicle at that date.[7]

**The basis of criminal responsibility under s 114(1)**

[10] A driver of a vehicle who drives at a speed over the speed limit commits an offence against s 20 by virtue of having so driven the vehicle. It is on the basis of having so driven, that the driver is criminally responsible for the offending.

[11] The offence that the driver has committed is a prescribed offence. Where the prescribed offence is detected by a photographic detection device, s 114(1) operates with effect that the person in control of the vehicle at the time is taken to have committed the prescribed offence, notwithstanding that he or she was not the offending driver.

[12] The role of s 114(1) is to attribute criminal responsibility to the person in charge in the circumstances in which it operates. The section does not create a new and separate offence. The person in charge is taken to have committed "the offence", that is to say, the prescribed offence that has happened and has been detected by a photographic detection device. Thus the factual basis for attribution of criminal responsibility for the prescribed offence under s 114(1) is different from that under s 20. For the driver, attribution is based upon his or her having driven over the speed limit. For the person in charge, attribution is based upon the prescribed offence having happened, its having been detected by a photographic detection device, and the status of the individual as the person in charge of the vehicle.

[13] Thus, where the person in charge is not the offending driver, criminal responsibility for the offending will be attributed to two individuals. Section 114(2) affirms that both are criminally liable for the offence but has effect that only one of them may be punished for it.

**The *Kable* doctrine issue**

[14] In written submissions, Mr Morris, who represented himself at the hearing of the special case, identified the vice in s 114(1) which, he argues, invalidates s 114 under the *Kable*[8] doctrine, as being that it impermissibly requires the Magistrates Court which is to determine a prosecution based on s 114(1), to proceed upon the basis of a factual premise which is untrue in fact.[9] The untrue fact will arise, he submits, where the person in charge of the vehicle is not the offending driver. In such a case, the court will be required to act upon a fact, namely, that the person in charge was the offending driver, notwithstanding that the fact is not true. In oral submissions, Mr Morris accepted that at the heart of his argument is the proposition that in that case, the section would require the magistrate to find as a fact, a fiction, namely, that the person in charge was driving the vehicle when the speeding offence was photographically detected.[10]

[15] In advancing the submission of invalidity, Mr Morris read from passages in a number of judgments delivered in the High Court. It is unnecessary to refer to them all. It is

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6 Pursuant to paragraph (b)(i) thereof.
7 See paragraph (b)(ii).
8 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
9 Outline of Argument para 29.
10 Tr1-24 l38 – Tr1-25 l10.

sufficient to mention certain of the more recent ones in which a statutory provision that would require a court to find a fiction as fact has been deprecated.

[16] In *Nicholas v The Queen*[11], in which *Kable* was considered, Brennan CJ observed:

> " … the duty [of a court] to act impartially is inconsistent with the acceptance of instructions from the legislature to find or not find a fact or otherwise to exercise judicial power in a particular way. A law that purports to direct the manner in which judicial power should be exercised is constitutionally invalid."[12]

[17] His Honour drew upon the condemnation of a usurpation of judicial power by impairment of a judicial function made in *Williamson v Ah On*[13] and elaborated:

> "If a court could be directed by the legislature to find that an accused, being found in possession of stolen goods, had stolen them, the legislature would have reduced the judicial function of fact finding to the merest formality. The legislative instruction to find that the accused stole the goods might prove not to be the fact. The legislature itself would have found the fact of stealing."[14]

[18] The following passage from the judgment of Gummow J in *Fardon v Attorney-General (Qld)*[15] was read:

> "No 'legal fiction' has been involved in this consideration of the Commonwealth's submissions. A supposition known to be false or fictional but the disproving of which the law forbids is one thing; the assumption of a proposition or condition taken as a step in syllogistic reasoning to test a larger thesis is another. The first denies the exercise of logic, the second exemplifies it."

[19] Reference was made to the endorsement by Gummow J[16] of the statement by Gaudron J in *Re Nolan; Ex parte Young*[17] that "the power to determine whether a person has engaged in conduct which is forbidden by law, and, if so, to make a binding and enforceable declaration as to the consequences which the law imposes by reason of that conduct lies at the heart of exclusive judicial power"; and also of the remarks of Deane J in *Re Tracey; Ex parte Ryan*[18] to like effect.

[20] It may be concluded from these judicial statements that if s 114(1) were to require a magistrate to find a fictional fact on which a conviction under the section would rest, then its validity would be questionable under the *Kable* doctrine as an impermissible intrusion upon the judicial function. It is critical for this conclusion to have application in this context for there to be such a requirement. Yet no such requirement exists in s 114(1). The section does not require a fictional finding to be made in any given case.

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11 [1998] HCA 9; (1998) 193 CLR 173.
12 At [20], citing *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 36-37.
13 (1926) 39 CLR 95 per Higgins J at 122 and Isaacs J at 108.
14 At [24].
15 [2004] HCA 46; (2004) 223 CLR 575 at [88].
16 At [76].
17 (1991) 172 CLR 460 at 497.
18 (1989) 166 CLR 518 at 580.

[21] Where a s 20 speeding offence has been committed, criminal responsibility for it under s 114(1) is not dependent upon a factual finding that the person in control was the driver of the vehicle at the time the offence was committed. To conclude that criminal responsibility is attributed to an individual under s 114(1), the magistrate must find, and need only find, that a speeding offence has happened; that the offence has been detected by a photographic detection device; and that the individual was the person in charge of the speeding vehicle at the time. No finding as to the identity of the actual driver need be made.

[22] Thus, there is no intrusion upon the judicial function by requiring a fiction to be found as fact. Moreover, if an issue does arise as to the identity of the offending driver as a result of steps taken under ss 114(3) or (8), the Magistrate may exercise jurisdiction to determine that issue of fact.

[23] For these reasons, this challenge to the constitutional validity of s 114 cannot succeed.

[24] It remains to note that the competency of the Queensland Parliament to enact deeming legislation in the form in which s 114(1) is enacted, was affirmed by this Court in *Saunders v Bowman*.[19] In that case, Keane JA (with whom de Jersey CJ and Douglas J agreed) remarked:

> "… Mr Saunders does not seem to agree with the legislature's evident concern to ensure that the owners of motor vehicles used to commit offences are held responsible for their use if the person directly responsible for the offence cannot be made subject to the law's sanctions. His particular concern seems to be that s 114(1) deems a person, who was not driving at the time an offence was committed, to have committed the offence. But there can be no doubt that Parliament has the power to legislate in this way. Mr Saunders' complaint is really that it is inappropriate for Parliament to do so."[20]

**Order**

[25] The parties have informed the Court that no order as to costs is sought.

[26] The question asked by the special case should be answered as follows:

> **Question:** Is s 114 of the *Transport Operations (Road Use Management) Act* 1995 (Qld) invalid on the ground that it infringes the principle identified in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51?
>
> **Answer**: No.

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19 [2008] QCA 112. The Court was not asked to consider a *Kable* doctrine challenge to the provision on that occasion.

20 At [12].